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Ravalli County Commissioners

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Jane E. Cowley, Esq.  
Colleen M. Dowdall, Esq.  
WORDEN THANE P.C.  
Attorneys at Law  
P.O. Box 4747  
Missoula, Montana 59806  
Telephone: (406) 721-3400

Attorneys for Plaintiff

FILED  
DEBBIE HARMON, CLERK

APR 17 2007

*Debbie Harmon*  
DEPUTY

MONTANA TWENTY-FIRST JUDICIAL DISTRICT COURT  
RAVALLI COUNTY

BARBARA M. HILLIGOSS,

Plaintiff,

-vs-

RAVALLI COUNTY CLERK AND  
RECORDER.

Defendant.

Dept. No. 2  
Cause No. DV-07-156 / 1

APPLICATION FOR WRIT OF  
MANDAMUS AND BRIEF IN  
SUPPORT

Plaintiff Barbara M. Hilligoss (hereinafter "Barbara Hilligoss"), hereby applies to this Court for an alternative writ of mandate directing Ravalli County Clerk and Recorder to immediately, after the receipt of this Court's writ, and no later than time set forth in this Court's Writ of Mandamus to record the Plaintiff's Condominium Declaration or to show cause before the court, at the time and place specified in the Writ, why she has not done so.

STATEMENT OF FACTS

1. Plaintiff Barbara Hilligoss is an Oregon resident who owns the following real property in Ravalli County, Montana, described as follows

1 (hereinafter the "Property"):

2 Parcel 1

3 The E½SE¼ of Section 10, Township 10 North, Range 20  
4 West, P.M.M., Ravalli County, Montana, as recorded in Book  
117 Deeds, Page 413.

5 TOGETHER WITH an access easement for ingress and egress  
6 as described and recorded in Document No. 565656.

7 Parcel 2

8 The NW¼SE¼ of Section 10, Township 10 North, Range 20  
9 West, P.M.M., Ravalli County, Montana, as recorded in Book  
125 Deeds, Page 116.

10 TOGETHER WITH an easement for ingress and egress over  
11 and across the north 30 feet of the east 300 feet of Section 15,  
Township 10 North, Range 20 West, for future development of  
the Grantee's property in Section 10 herein.

12 2. Defendant Ravalli County Clerk and Recorder, Regina  
13 Plettenberg (hereinafter "Plettenberg") is a Ravalli County elected official,  
14 and is charged with the duty of recording legal documents relating to real  
15 estate matters pursuant to Mont. Code Ann. § 7-4-2613.

16 3. Defendant Plettenberg is required to immediately enter a  
17 document presented for recording in the public record, if accompanied by  
18 an appropriate fee, pursuant to Mont. Code Ann. § 7-4-2617.

19 4. Defendant Plettenberg is required to record a declaration of  
20 condominium which meets the requirements of the Unit Ownership Act,  
21 Mont. Code Ann. §§ 70-23-101, et. seq., pursuant to Mont. Code Ann. §  
22 70-23-305.

23 5. Venue is proper in Ravalli County as a Ravalli County elected  
24 official is a party and the real property which is subject to the Condominium  
25 Declarations is in Ravalli County.

1           6.     Attached to this Application as Exhibit A is the Condominium  
2 Declaration of Mission Glyn Condominiums (hereinafter the "Declaration"),  
3 which relates to the Property. Attached to the Declaration are the Bylaws  
4 of Mission Glyn Condominiums Owners' Association, Inc. (hereinafter the  
5 "Bylaws").

6           7.     On April 5, 2007, Defendant Plettenberg wrote a letter to  
7 Colleen Dowdall, as counsel for Barbara Hilligoss, stating that the  
8 Declaration that was hand delivered to her office by Dennis Hilligoss for  
9 recording, together with a check for the fees for recording those  
10 documents, was refused.

11          8.     Defendant Plettenberg's letter refers to a March 19, 2007  
12 memorandum from County Attorney George Corn, which sets forth  
13 reasons why Corn believed Plettenberg should refuse to record the  
14 Declaration. A copy of the letter and the memorandum are attached to this  
15 application as Exhibit B.

16          9.     The memorandum from County Attorney George Corn  
17 disregards the statutory duty of the Clerk and Recorder to record  
18 condominium declarations.

19          10.    Defendant Plettenberg, in her letter, refers Colleen Dowdall to  
20 the Ravalli County Planning Department and the Environmental Health  
21 office for review of the Declaration prior to recording.

22          11.    There is no statutory authority for the County Planning  
23 Department of Environmental Health to review a condominium declaration  
24 prior to the recording of a declaration.  
25  
26

1           12. The process for creating a condominium project is established  
2 by Mont. Code Ann. §§ 70-23-103 through 70-23-308, which are part of  
3 Montana's Unit Ownership Act.

4           13. Mont. Code Ann. § 70-23-103 provides that property is  
5 submitted to the provisions of the Unit Ownership Act by recording a  
6 condominium declaration in the county in which the property is located.

7           14. Mont. Code Ann. § 70-23-301 requires a condominium  
8 declaration to contain the following:

- 9           (1) a description of the land, whether leased or in fee simple,  
10           on which the building is or is to be located;  
11           (2) the name by which the property shall be known and a  
12           general description of the building, including the number  
13           of stories and basements, the number of units, and the  
14           principal materials of which it is constructed;  
15           (3) the unit designation, location, approximate area of each  
16           unit, and any other data necessary for proper  
17           identification;  
18           (4) a description of the general common elements and the  
19           percentage of the interest of each unit owner therein;  
20           (5) a description of the limited common elements, if any,  
21           stating to which units their use is reserved and in what  
22           percentage;  
23           (6) a statement of the use for which the building and each of  
24           the units is intended; and  
25           (7) the name of a person to receive service of process.  
26

1        15. The requirements of Mont. Code Ann. § 70-23-301 are satisfied  
2 by the following provisions of the Declaration:

3        (1) Subpart (1) is satisfied by Section 1 of the Declaration.

4        (2) Subpart (2) is satisfied by Sections 2, 3, 5, and 6 of the  
5 Declaration.

6        (3) Subpart (3) is satisfied by Section 4(z) and Exhibits A and C of  
7 the Declaration.

8        (4) Subpart (4) is satisfied by Sections 4(l), 9, and 10 and Exhibit C  
9 of the Declaration.

10       (5) Subpart (5) is satisfied by Sections 4(m) and Exhibit C of the  
11 Declaration.

12       (6) Subpart (6) is satisfied by Sections 3, 20, and 21 of the  
13 Declaration.

14       (7) Subpart (7) is satisfied by Section 63 of the Declaration.

15       16. Mont. Code Ann. § 70-23-302 permits the recording of a  
16 preliminary declaration before construction of the building described in the  
17 declaration is completed, and provides that the preliminary declaration  
18 shall set forth as many of the particulars required by Mont. Code Ann. §  
19 70-23-301 as may then be practicable. The Declaration sets forth all of the  
20 particulars required by Mont. Code Ann. § 70-23-301.

21       17. Mont. Code Ann. § 70-23-303 places restrictions on the names  
22 which can be given to condominium projects. The name of Mission Glyn  
23 Condominiums does not violate these restrictions.

24       18. Mont. Code Ann. § 70-23-304 requires the Montana  
25 Department of Revenue to approve the name of a condominium project  
26 and certify that the taxes and assessments due and payable with respect

1 to the project have been paid before the declaration for the project may be  
2 recorded. The certificate of the Montana Department of Revenue which is  
3 attached to the Declaration as Exhibit D satisfies these requirements.

4 19. Mont. Code Ann. § 70-23-306(1) requires floor plans of the  
5 building described in a declaration to be recorded simultaneously with the  
6 declaration. The floor plans which are attached to the Declaration as  
7 Exhibit B satisfy this requirement.

8 20. Mont. Code Ann. § 70-23-306(2) requires a statement of a  
9 registered architect, registered professional engineer, or registered  
10 professional land surveyor be attached to the floor plans which are  
11 recorded with a declaration, unless the building shown in the floor plans  
12 has not been constructed, in which case an amendment to the declaration  
13 with such a statement must be recorded within 30 days from the date of  
14 completion of the building or the date of first occupancy of the building,  
15 whichever first occurs.

16 21. The buildings described in the floor plans which are attached to  
17 the Declaration as Exhibit B have not been constructed. Sections 4(s) and  
18 7 and Exhibit B of the Declaration explain how the requirements of Mont.  
19 Code Ann. § 70-23-306(2) will be satisfied when the buildings described in  
20 the floor plans have been constructed.

21 22. Mont. Code Ann. § 70-23-307 requires a copy of the bylaws of  
22 the condominium owners' association to be recorded simultaneously with  
23 the condominium declaration. The Bylaws for the Mission Glyn  
24 Condominium Owners' Association are attached to the Declaration with the  
25 certificate of the directors of Mission Glyn Condominium Owners'  
26 Association, Inc., which is required by Mont. Code Ann. § 70-23-307(2).

1       23. Mont. Code Ann. § 70-23-308 requires the bylaws of a  
2 condominium project to provide for the following:

- 3       (1) The election from among the unit owners of a board of  
4 directors, the number of persons constituting the board, and  
5 that the terms of at least one-third of the directors expire  
6 annually; the powers and duties of the board; the  
7 compensation, if any, of the directors; the method of removal  
8 from office of the directors; and whether or not the board may  
9 engage the services of a manager or managing agent;
- 10       (2) The method of calling meetings of the unit owners and the  
11 percentage, if other than a majority as defined by 70-23-102,  
12 that constitutes a quorum;
- 13       (3) The election of a presiding officer, a secretary, and a treasurer;
- 14       (4) The maintenance, upkeep, and repair of the common elements  
15 and payment for those expenses, including the method of  
16 approving payment vouchers;
- 17       (5) The employment of personnel necessary for the maintenance,  
18 upkeep, and repair of the common elements;
- 19       (6) The manner of collecting from the unit owners their share of the  
20 common expenses;
- 21       (7) The method of adopting and of amending administrative rules  
22 governing the details of the operation and use of the common  
23 elements;
- 24       (8) Restrictions on and requirements respecting the use and  
25 maintenance of the units and the use of the common elements,  
26 not included in the declaration, as are designed to prevent

1 unreasonable interference with the use of the unit owners'  
2 respective units and of the common elements by the several  
3 unit owners; and

4 (9) The method of amending the bylaws subject to Mont. Code  
5 Ann. § 70-23-307.

6 24. The requirement of Mont. Code Ann. § 70-23-308(1) that a  
7 board of directors be elected from among the unit owners is satisfied by  
8 Sections 4.1(a), 4.5, and 4.6 of the Bylaws.

9 25. The requirement of Mont. Code Ann. § 70-23-308(1) that the  
10 bylaws specify the number of persons constituting the board is satisfied by  
11 Section 4.3 of the Bylaws.

12 26. The requirement of Mont. Code Ann. § 70-23-308(1) that the  
13 terms of at least one-third of the directors expire annually is satisfied by  
14 Section 4.7 of the Bylaws.

15 27. The requirement of Mont. Code Ann. § 70-23-308(1) that the  
16 bylaws specify the powers and duties of the board is satisfied by Section  
17 4.1 and 4.2 of the Bylaws.

18 28. The requirement of Mont. Code Ann. § 70-23-308(1) that the  
19 bylaws specify the compensation, if any, of the directors is satisfied by  
20 Section 4.13 of the Bylaws.

21 29. The requirement of Mont. Code Ann. § 70-23-308(1) that the  
22 bylaws specify the method of removal from office of the directors is  
23 satisfied by Section 4.11 of the Bylaws.

24 30. The requirement of Mont. Code Ann. § 70-23-308(1) that the  
25 bylaws specify whether or not the board may engage the services of a  
26



1 manager or managing agent is satisfied by Sections 1.14 and 4.2(c) of the  
2 bylaws and Section 24 of the Declaration.

3 31. The requirement of Mont. Code Ann. § 70-23-308(2) that the  
4 bylaws specify the method of calling meetings of the unit owners and the  
5 percentage of unit owners which constitutes a quorum is satisfied by  
6 Sections 3.8-3.16 of the Bylaws.

7 32. The requirement of Mont. Code Ann. § 70-23-308(3) that the  
8 bylaws provide for the election of a presiding officer, a secretary, and a  
9 treasurer is satisfied by Sections 6.1-6.3 of the Bylaws.

10 33. The requirement of Mont. Code Ann. § 70-23-308(4) that the  
11 bylaws provide for the maintenance, upkeep, and repair of the common  
12 elements and payment for those expenses, including the method of  
13 approving payment vouchers, is satisfied by Sections 7.1-7.7 of the Bylaws  
14 and Sections 28-42 of the Declaration.

15 34. The requirement of Mont. Code Ann. § 70-23-308(5) that the  
16 bylaws provide for the employment of personnel necessary for the  
17 maintenance, upkeep, and repair of the common elements is satisfied by  
18 Section 4.2(c) of the Bylaws and Section 25 of the Declaration.

19 35. The requirement of Mont. Code Ann. § 70-23-308(6) that the  
20 bylaws specify the manner of collecting from the unit owners their share of  
21 the common expenses is satisfied by Sections 7.1-7.7 of the Bylaws and  
22 Sections 29-39 of the Declaration.

23 36. The requirement of Mont. Code Ann. § 70-23-308(7) that the  
24 bylaws specify the method of adopting and amending administrative rules  
25 governing the details of the operation and use of the common elements is  
26

1 satisfied by Sections 1.20 and 4.2(t) of the Bylaws and Section 26 of the  
2 Declaration.

3 37. The requirement of Mont. Code Ann. § 70-23-308(8) that the  
4 bylaws specify the restrictions on and requirements respecting the use and  
5 maintenance of the units and the use of the common elements are  
6 satisfied by Sections 20, 21, 40, 41, 42 and 43 of the Declaration and  
7 Sections 4.2(a), 4.2(r), 4.2(t) and 4.2(u) of the Bylaws.

8 38 The requirement of Mont. Code Ann. § 70-23-308(9) that the  
9 bylaws specify a method of amending the bylaws is satisfied by Sections  
10 10.1-10.3 of the Bylaws.

11 39. Mont. Code Ann. § 70-23-305 provides that "when a  
12 declaration satisfies the requirements of the Unit Ownership Act, it must,  
13 upon the payment of the fees provided by law, be recorded by the  
14 recording officer."

15 40. The Declaration and the Bylaws satisfy all of the requirements  
16 of the Unit Ownership Act.

17 41. The County has a duty to record condominium declarations that  
18 meet the requirements of the Unit Ownership Act and does not have the  
19 power or authority to impose restrictions or conditions on the recording of  
20 condominium declarations other than those provided for in the Unit  
21 Ownership Act, Mont. Code Ann. §§ 70-23-101 through 70-23-902.

22 42. Defendant's refusal to record the Declaration is a violation of  
23 her statutory duty and there is no plain, speedy, or adequate remedy  
24 available to the Plaintiff.  
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26

1 **BRIEF**

2 Pursuant to Mont. Code Ann. §§ 27-26-101 et seq. Plaintiff applies to  
3 this Court for an alternative writ of mandamus to compel the Ravalli County  
4 Clerk and Recorder to record the Condominium Declaration of the Mission  
5 Glyn Condominiums. A true and correct copy of the Declaration is  
6 attached hereto as Exhibit A.

7 Under Mont Code Ann. § 70-23-305 "when a declaration is made and  
8 approved as required, it **must**, upon the payment of the fees provided by  
9 law, be recorded by the recording officer." (emphasis added). As  
10 indicated in the statement of facts, the Declaration meets all statutory  
11 elements required for approval.

12 Defendant Plettenberg had a clear legal duty to record the  
13 Declaration. The Montana Supreme Court has held a "clerk may refuse to  
14 record a deed if the Clerk has legal justification to do so." Rocky Mountain  
15 Timberlands, Inc. v. Lund, (1994) 877 P.2d 1018, 1021, 265 Mont. 463,  
16 468. Defendant Plettenberg has no legal justification to refuse to record  
17 the Declaration. The Clerk and Recorder has a clear legal duty to record  
18 all documents authorized by law. Mont. Code Ann. § 7-4-2617 sets forth  
19 the procedure clerks are to use when recording documents.

20 (1) When any instrument, paper, or notice authorized by law to be  
21 recorded is deposited for record in the office of the county  
22 clerk, as ex officio recorder, and accompanied by the required  
23 fee, he must endorse upon the same the time it was received,  
noting the year, month, day, hour, and minute of its reception,  
and the reception of the instrument must be immediately  
entered in the county clerk and recorder's reception book.

24 (2) If the printed, written, or typed words or numbers are  
25 considered by the clerk and recorder to be illegible and not  
26 legibly reproducible, the clerk and recorder must affix to the  
recorded document a statement that the document is illegible  
and not legibly reproducible.

1 (3) The county clerk must record said instrument without delay,  
2 together with the acknowledgment, proofs, and certificates  
3 written upon or annexed to the same and with the plats,  
4 surveys, schedule, and other papers thereto annexed, in the  
order and as of the time when the same was received for  
record and must note at the foot of the record the exact time of  
its reception.

5 (4) The county clerk must also endorse upon each instrument,  
6 paper, or notice the time when and the book and pages or  
7 document number in which it is recorded and must thereafter  
deliver it, upon request, to the party leaving the same for record  
or to his order.

8 In Rocky Mountain Timberlands, Inc., the court, in looking at Mont. Code  
9 Ann. § 7-4-2617(1), determined that the statute put a "caveat onto the  
10 mandatory duty of a clerk: the paper filed must be authorized by law.  
11 When a paper is not authorized by law, the statute does not hold the clerk  
12 to the requirement." Id. Here, the Petitioner has submitted a document  
13 that is authorized, and Defendant Plettenberg refused to exercise her  
14 duty to record. Based on the foregoing, Plaintiff has a clear legal right to  
15 require the County to follow Mont. Code Ann. §§ 7-4-2617 and 70-23-305  
16 and record its Declaration.

17 As Defendant Plettenberg refused to record the Declaration, Plaintiff  
18 is left without a plain, speedy, or adequate remedy at law. In State ex rel.  
19 Leach v. Visser (1988) 767 P.2d 858, 861, 234 Mont 438, 443, the  
20 Montana Supreme Court found that a writ of mandate was the proper relief  
21 when Petitioner was requesting the performance of a clear legal duty. In  
22 that case, a property owner applied for a writ of mandate ordering the  
23 county to record an occasional sale property transfer. The court, citing,  
24 State ex rel. Swart v. Stucky, (1977) 564 P.2d 983,987, 172 Mont. 302,  
25 stated:

1 A declaratory judgment action would not necessarily get the  
2 certificate of survey filed in the light of previous difficulties  
3 between petition and the clerk and recorder in getting such  
4 certificates filed . . . A writ of mandate is the only remedy  
5 available to secure the ultimate relief sought by the petitioner- -  
6 to compel the lifting of sanitary restrictions, the filing of a  
7 certificate of survey, and an award of relator's attorney fees.

8 The Swart court also held that statutorily created exemptions from  
9 subdivision review could not be taken away under the guise of delegated  
10 powers. In that case, the Department of Community Affairs had attempted  
11 to negate the statutory right for occasional sales to be exempt from the  
12 subdivision requirements. Swart 564 P.2d at 986, 172 Mont at 308-309.  
13 This is similar to the attempts Defendant Plettenberg is making to create  
14 additional barriers to recording Condominium Declarations that are not  
15 founded in law.

16 Plaintiff had to obtain the services of Worden Thane P.C. to advise  
17 her and to bring this application to obtain redress against the unlawful,  
18 arbitrary and capricious acts of Defendant. Plaintiff, therefore, is entitled to  
19 recover from Defendant its reasonable attorney's fees and costs incurred  
20 herein.

21 WHEREFORE, Plaintiff requests the following relief:

22 1. The Court declare that the Ravalli County Clerk and Recorder  
23 has failed to follow Mont. Code Ann. §§ 7-4-2617 and 70-23-305;

24 2. The Court issue a Writ directing the Defendant to record the  
25 Declaration;

26 3. The Court set a time by which the Declaration is to be recorded  
or the Defendant is to appear before this court and show cause as to why  
she has not recorded it;

1 4. Plaintiff recover her attorneys fees and costs pursuant to Mont.  
2 Code Ann. §§ 27-8-311 and 27-26-402; and

3 5. The Court award such other relief as is just and proper and  
4 equitable under the circumstances.

5 DATED this 13<sup>th</sup> day of April, 2007.

6 WORDEN THANE P.C.  
7 Attorneys for Plaintiff,

8 By. 

9 Jane E. Cowley  
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